

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.606(b),) MM Docket No. 93-191
Table of Allotments,) RM-8088
TV Broadcast Stations (Pueblo, CO))

To: The Commission

JOINT REPLY

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The University of Southern Colorado (the "University"), licensee of Television Station KTSC(TV), Pueblo, Colorado, and Sangre de Cristo Communications, Inc. ("SCC"), licensee of Television Station KOAA-TV, Pueblo, Colorado, by their respective attorneys, jointly reply to the Opposition of Ackerley Communications Group, Inc. ("KKTV") to SCC's and the University's Joint Application for Review in the above-captioned proceeding.

KKTV makes the same fatal error that the staff of the Allocations Branch (the "Staff") did in issuing its decision in this proceeding.^{1/} KKTV erroneously assumes that the short-spacing waiver and the delay in construction of the Cheyenne Mountain facilities is decisionally significant to SCC's and the University's proposed channel exchange (the "Channel Swap") and this rulemaking. Neither KKTV nor the Staff can explain why for purposes of a channel swap a constructed facility differs from an unbuilt facility or a short-spaced facility differs from a fully-spaced station. The Commission's channel exchange rules make no such distinction nor does relevant case precedent. Certainly, KKTV and the Staff do not cite any case to the contrary. Instead, they each manufacture meaningless distinctions in attempting to support their illogical and unfounded conclusions. Commission reversal of the Staff Decision is therefore necessary.

^{1/} Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Pueblo, Colorado), MM Docket No. 93-191 (July 14, 1995) (the "Staff Decision").

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KKTV's selective reading of the University's 1990 short-spacing waiver request and the Video Services Division's decision granting the waiver^{2/} cannot change the simple fact that the Commission based the grant of the waiver on the Commission's established technical waiver criteria, not on KTSC's noncommercial status.^{3/} One sentence of the Kreisman Letter's waiver analysis mentions KTSC's status as a noncommercial station. The remainder of that decision discusses the technical aspects of KTSC's proposal, namely the availability of alternative sites, inability to provide signal coverage over Colorado Springs, and any loss of service resulting from the modification. KKTV also fails to show that the Commission uses non-technical criteria to decide short-spacing waivers.^{4/} Commission precedent on this is clear: the Commission does not base waivers of its technical rules on non-technical considerations. See Joint Application for

2/ Letter from Barbara A. Kreisman to Thomas Aube, FCC File No. BPET-900122KE (Feb. 28, 1991) (the "Kreisman Letter").

3/ KKTV reads far too much into the University's waiver request. That the University mentioned its educational programming in passing is not tantamount to an argument that the short-spacing waiver should be granted because of KTSC's noncommercial status. The University did not take at that time nor has it since taken the legal position that its status as a noncommercial licensee or its educational programming should be or was the basis for the short-spacing waiver; judicial estoppel therefore has no relevance here. See Allen v. Zurick Ins. Co., 667 F.2d 1162 (4th Cir. 1982)(judicial estoppel is intended to prevent a party from taking a legal position in conflict with a position taken earlier in the same or related litigation). In any event, the principle is not widely accepted; neither the U.S. Court of Appeals for the D.C. Circuit nor the U.S. Court of Appeals for the 10th Circuit recognizes the principle of judicial estoppel. See United Mine Workers of America 1974 Pension v. Pittston Co., 984 F.2d 469 (D.C. Cir.), cert. denied, 113 S. Ct. 3040 (1993); United States v. 49.01 Acres of Land, More or Less, Situate in Osage County, State of Oklahoma, 802 F.2d 387 (10th Cir. 1986). The mere reference to the doctrine is yet another KKTV red herring.

4/ Western Broadcasting of Puerto Rico, 69 RR 2d 718 (1991) does not support KKTV's position. Like other television short-spacing cases, the waiver granted in Western Broadcasting was based on an application of technical criteria. The content of the station's programming had no bearing on the Commission's decision to grant the waiver.

Review at 8-10 and notes therein. KKTV has not shown otherwise.^{5/}

KKTV's analysis of the Channel Swap's public interest benefits is completely misguided. KKTV erroneously faults the University for proposing to serve Colorado Springs with a translator. It claims that the University is "going back on its word" about its inability to serve Colorado Springs adequately with a translator. KKTV Opposition at 16, 22. This is simply not true. The University considered several alternatives to its Channel 53 translator service to Colorado Springs, including another UHF translator, an allotment of Channel 66 to Colorado Springs, operation of a satellite station from Colorado Springs, and the move to Cheyenne Mountain.^{6/} The Cheyenne Mountain Permit was the only feasible option at the time. When it agreed to swap channels with SCC, the University reaffirmed its commitment to improve KTSC's service to Colorado Springs; its higher position on the Baculite Mesa tower and use of Translator K30AA will substantially improve KTSC's coverage of Colorado Springs.^{7/}

^{5/} KKTV's thin constitutional argument is equally unavailing. KKTV claims, again without any legal support, that it is constitutional for the Commission to create a preference for noncommercial over commercial programming. The Supreme Court, however, has ruled otherwise. See City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993). KKTV has not shown how the noncommercial/commercial distinction drawn by the Staff in the instant case is any less offensive to the Constitution than the distinction drawn by the City of Cincinnati in Discovery Network.

^{6/} See Application of the University for Modification of Facilities (File No. BPET-900122KE).

^{7/} The University's use of a translator is completely consistent with Commission precedent recognizing translators' unique role in providing off-the-air television service to all areas within Colorado. See Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations, (Glenwood Springs and Alamosa, Colorado, and Vernal, Utah), 46 RR 2d 1388 (1980) ("the broken terrain of much of Colorado calls for the use of translators, and in fact most of the stations in Colorado Springs and elsewhere in the state utilize them"); Joint Application for Review at 15-18.

KKTV's claim that the Channel Swap will result in a loss of KOAA service is plainly erroneous. Any loss of service that may be caused by KOAA's relocation to Cheyenne Mountain would be de minimis due to the availability of cable and television translator service in any potential loss areas.^{8/} SCC has pledged to build and operate translators in those areas to compensate for any possible service loss, and remaining loss areas would be well-served by cable television and direct broadcast satellite service.^{9/} Moreover, the Commission has already held that any service loss that may result from operation of Channel 8 at Cheyenne Mountain can be reconciled with the public interest. See Kreisman Letter at 2.

The Joint Application for Review does not violate 47 C.F.R. § 1.115(c). The University and SCC argued and provided factual evidence in their Joint Reply Comments that displacement of the University's proposed translators was unlikely. See Joint Reply Comments at 21-24. The Staff ignored this evidence and reached an erroneous conclusion that noncommercial service gains could not be achieved through the use of translators. Staff Decision at ¶ 24. The Engineering Statement submitted with the Joint Application for Review merely rebuts the Staff's incorrect findings and therefore was appropriately submitted at this stage in the proceeding.^{10/}

8/ See Joint Reply Comments of the University and SCC at 15-20 (Sept. 27, 1993). See, e.g., Elba Development Corp., 5 FCC Rcd 6767 (1990) (FCC policy provides that availability of cable and translator service can be used to demonstrate elimination or reduction of white areas); Coronado Communications Co., 8 FCC Rcd 159 (1992) (areas where translator and cable service available can be excluded in calculation of loss area); Joint Reply Comments at 16, n.39.

9/ SCC's proposed translator operations would reduce the population in the potential loss areas to the de minimis level of 1,463 persons. See Joint Reply Comments at 17 and Engineering Statement attached thereto as Attachment B.

10/ Even if the Engineering Statement were considered "new material," Commission review of facts which undermine the basis for the Staff Decision is clearly in the public interest and would support waiver of Section 1.115(c)'s requirements. See WSTE-TV, Inc. v. FCC, 566 (continued...)

Finally, KKTV's argument that the Staff correctly denied University's and SCC's Joint Motion to Consolidate Proceedings ignores reality and its own pleading. The fact that KKTV spends over two pages of its Opposition discussing KTSC's applications to extend and assign the Cheyenne Mountain Permit is sufficient proof that this proceeding screams for consolidation with these collateral proceedings.

This case presents the Commission with a unique opportunity to further the public interest. Reversal of the Staff Decision and approval of the Channel Swap means more money for the University, better educational programming, more noncommercial and commercial service for the citizens of Colorado Springs and the Western Slope and more competition among the three network affiliates in the Pueblo-Colorado Springs market. All of this may be accomplished in complete accordance with the Commission's channel exchange policy and precedent. KKTV has shown nothing to the contrary. Its Opposition, therefore, must be denied and the Joint Application for Review granted.

Respectfully submitted,

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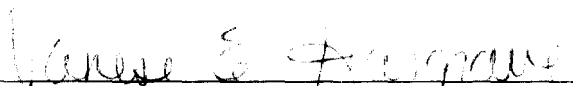
F.2d 333, 336-37 (D.C. Cir. 1977); Duchossois Comm. Co. of Maryland, Inc., 10 FCC Rcd 6688, 6690 (1995).

CERTIFICATE OF SERVICE

I, Vanese E. Hargrove, hereby certify that a copy of the foregoing "**Joint Reply**" was sent on this 13th day of September, 1995, via United States mail, postage prepaid, unless otherwise indicated, to the following:

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